INTEREST OF AMICI

The New Jersey Lawsuit Reform Alliance ("NJLRA") is a statewide, bipartisan group of individuals, businesses and organizations dedicated to improving New Jersey's civil justice system and advocating for legal reform in the Legislature and the courts. The New Jersey Business & Industry Association ("NJBIA") is presently the Nation's largest statewide employer organization, with 23,000 member companies in all industries and in every region of the State of New Jersey. Widely regarded as one of the most credible and effective advocates for business in the State, the NJBIA pursues a wide range of government affairs activities that are designed to protect the interests of New Jersey-based employers and keep New Jersey open for business.

Both organizations share a keen interest in protecting New Jersey's economy and business environment from the negative effects of abusive civil litigation. The businesses that are the targets of junk suits pass these costs through to the public by cutting jobs, reducing wages for employees, increasing the prices charged for goods and services, and sometimes abandoning the State altogether. In order to foster the economic well-being of all New Jersey residents, individuals and business entities alike, both the NJLRA and the NJBIA seek legal reforms that provide reasonable protections against the filing of meritless suits designed to extract early settlements and large

attorney fee awards from defendants who cannot afford to incur the costs of litigating through trial and appeal, even when they should prevail on the merits.

One important source of litigation abuse is the misuse of the class action device. No one doubts that class actions have a legitimate place in the New Jersey court system. But class actions also are extremely expensive for defendant companies to litigate, and, as a result, they exert an *in terrorem* effect that sometimes leads defendants to settle meritless or marginal claims for substantial amounts of money just to avoid the even larger costs of litigating through trial and appeal. And, sometimes class action lawyers use such suits as a way to generate large fees for themselves while they recover token relief for the members of the class.

The ultimate aim of the procedural rules that govern class actions is to strike a balance for the public good between the benefits of that device and respect for the due process rights of defendants. If classes are improvidently certified, it is more likely that the class action device will be used to extort wealth transfers from New Jersey businesses to plaintiffs' lawyers rather than provide relief to legitimately-injured citizens. The question before the Court in this appeal -- how to interpret the predominance and superiority requirements of Rule 4:32-1(b)(3) in the context of a consumer

fraud action challenging a mass media advertising campaign -- presents a stark example of the need for such balance. By refusing to relieve class members of the obligation to actually prove the essential elements of their consumer fraud claims and replace that requirement with a dubious evidentiary presumption, the Law Division got it right and stopped an unsuitable class action in its tracks. Accordingly, the NJLRA and NJBIA respectfully submit this brief in support of affirming the Law Division's decision.

PRELIMINARY STATEMENT

Plaintiff, Melissa Lee ("Plaintiff"), and her *amicus*, Public Citizen, Inc. ("Public Citizen"), seek to transform class action practice in this State by substituting a presumption for proof that the alleged acts of consumer fraud caused each class member ascertainable loss. Their arguments on appeal boil down to a simple, albeit incorrect, proposition: so long as a putative class representative alleges the existence of a single false claim about a product to which most or all class members were exposed through the defendant company's advertising, she satisfies the predominance requirement of Rule 4:32-1(b)(3) and is entitled to certification and a class-wide trial on the issue of whether the claim was false. What about the need for individual inquiries to determine whether each class member suffered an ascertainable loss caused by the allegedly false

advertising and can thereby establish the essential elements of a Consumer Fraud Act claim? Not an issue, according to Plaintiff and Public Citizen, because the trial court can simply presume the existence of these essential elements. Such automatic certification of consumer fraud class actions is required, so say Plaintiff and Public Citizen, to comply with the supposed principle that class actions must be permitted where the result of denying certification would be to end litigation by class members whose losses are too small to make individual lawsuits viable.

None of this is right. For Plaintiff's proposed class to be certified in this case, she had to demonstrate that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Rule 4:32-1(b)(3). The purpose of the predominance requirement is to ensure that liability can be adjudicated on a basis common to the class that also respects the due-process rights of a defendant to meet the evidence advanced against it. If, notwithstanding the existence of a common issue or two, the claims of individual class members really arise from varying sets of facts, such that each class member will have to tell his or her own story to establish the defendant's liability, then the defendant has a right to explore the evidence against it by each individual class member, and the supposed efficiencies of

class-wide litigation will never materialize. In these circumstances, certification of the proposed class is not justified. That is the case with Plaintiff's proposed class.

As the Law Division correctly recognized, none of Plaintiff's proposed short-cuts to the predominance requirement work. In addition to demonstrating that the defendant engaged in unlawful conduct, private plaintiffs must **prove** both an ascertainable loss and that it was incurred "as a result of" an unlawful fact in order to recover damages under the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (the "CFA"). Nothing in the statute, Rule 4:32 or the case law of this State authorizes courts to substitute an expedient "presumption" for that proof requirement in class actions. In fact, as recently clarified by our Supreme Court in International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 391-92 (2007), the law is exactly the opposite.

Moreover, merely demonstrating the superiority of the class action device in a particular case does not relieve the class representative of the need to also satisfy the predominance requirement. Consumer plaintiffs -- even ones who have suffered small losses on an individual basis -- do not possess a right to adjudicate their claims as a class. They can only do so if they satisfy the procedural requirements for class certification, including the predominance requirement, and

thereby demonstrate that it makes sense for all parties and the court system to litigate their claims on a class-wide basis.

Far from protecting purveyors of snake oil, as Public Citizen fears (PCb13),[1] enforcing the requirements for class certification shifts responsibility for regulating unscrupulous manufacturers in appropriate consumer fraud cases from the judiciary to the Attorney General, who enjoys broad power under the CFA to investigate fraudulent business activities, prosecute violations of the statute and seek appropriate relief for victims. In certain kinds of cases -- and this is one of them -- enforcement of the CFA through the Attorney General is a more efficient, less costly and more appropriate alternative to foisting a non-cohesive, unmanageable class on a busy trial court.

Just as important (if not more so), enforcing the predominance requirement is one way of ensuring the proper balance between the benefits and harms of employing class-wide litigation. Presuming the satisfaction of, or ignoring altogether, essential elements of the class members' substantive claims just so the lawsuit can proceed as a class action is a surefire way of allowing meritless suits to impose draconian

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[1] "PCb__" refers to the Brief of Amicus Curiae Public Citizen, Inc. "Pb__" refers to Plaintiff/Appellant's Brief. "Prb__" refers to Plaintiff/Appellant's Reply Brief and Appendix. "Db__" refers to the Brief of Defendants-Respondents. "Da__" refers to the Appendix of Defendants-Respondents.

costs on corporate defendants. Defendants will settle such suits to avoid the costs of litigating, thereby permitting undeserving plaintiffs (and their lawyers) to extort substantial sums from defendants who simply cannot afford to vindicate themselves in court. Because such defendants pass on these costs to employees and purchasers of their products alike, that harms everyone.

The Court should affirm the Law Division's denial of Plaintiff's motion for class certification.

ARGUMENT

POINT I

PLAINTIFF HAS NOT SATISFIED THE PREDOMINANCE REQUIREMENT OF RULE 4:32-1(B)(3)

A. Plaintiff's Proposed Class Lacks Sufficient Cohesion To Satisfy The Predominance Requirement

Class actions perform several functions in New Jersey. In theory, the ability to efficiently litigate the claims of thousands of persons in a single action furthers the interests of judicial economy, cost-effectiveness and convenience. See Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 104 (2007). Class-wide litigation can also ensure consistent treatment of similarly-situated class members and spare a defendant from the risk of courts imposing disparate obligations upon it in different lawsuits. See ibid. In addition, there is no question that in appropriate cases class actions help to

equalize adversaries and provide a remedy to litigants whose potential recovery would be insufficient to support individual lawsuits. Ibid.

The potential benefits of class-wide litigation, however, are tied to enforcement of the rules that govern them. This is most clearly the case with respect to the predominance requirement, which tests "whether the proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" Id. at 108 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997)). Due to the need to resolve in one proceeding the claims of potentially tens of thousands of absent class members, class actions pose manageability problems and costs for trial courts that are not present when each claimant files a separate lawsuit. Proof of liability based on broad-brush evidence common to the class sacrifices the due process rights of defendants, if the facts and circumstances of individual class members leaves many unable to muster *prima facie* proof of liability. And if the trial court has to hold thousands of mini-trials to resolve the claims of all class members, the potential gains in efficiency and consistency promised by the class action device dissipate.

Accordingly, at minimum, predominance requires the existence of a "common nucleus of operative facts" among the class members and proof that the "benefit from the determination

in a class action [of common questions] outweighs the problems of individual actions." International Union, 192 N.J. at 383 (quoting Iliadis, 191 N.J. at 108) (internal quotation marks omitted). Given the critical importance of this factor to the achievement of the potential benefits of the class action device in a given case, courts must undertake a rigorous analysis of whether the predominance criterion is satisfied. See id. at 382; Iliadis, 191 N.J. at 106-07.

In this case, Plaintiff sought certification of a class of all New Jersey residents who purchased Relacore since its entry onto the market in 2002. (Da167.) Plaintiff seeks damages on behalf of all class members. (Da82.) To recover damages under the CFA, each member of the class must prove that (i) Defendants engaged in unlawful conduct, (ii) each plaintiff suffered an ascertainable loss, and (iii) a causal relationship exists between the unlawful conduct and each plaintiff's ascertainable loss. International Union, 192 N.J. at 389 (citing N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003)).[2] In the context of the specific facts of this case,

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[2] This Court's decision in Laufer v. The United States Life Insurance Company in the City of New York, 385 N.J. Super. 172 (App. Div. 2006), is not to the contrary. (See Pb34-36.) Laufer involved a class certified for recovery of injunctive relief under Rule 4:32-1(b)(2), rather than (as in this case) a damages class sought to be certified under Rule 4:32-

each member must prove that (i) Defendants' advertising for Relacore was false (unlawful conduct), (ii) plaintiff paid money to buy Relacore (ascertainable loss), and (iii) plaintiff bought Relacore because of one or more of its falsely-advertised properties induced the purchase, and the product did not satisfy those expectations. See generally Gross v. Johnson & Johnson-Merck Consumer Pharm. Co., 303 N.J. Super. 336 (Law Div. 1997). These three items are not defenses; they are essential elements of each class member's CFA claim. International Union, 192 N.J. at 389; Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607 (1997)("[n]ot just 'any erroneous statement' will constitute a misrepresentation prohibited by [the CFA]. The misrepresentation must be material to the transaction. . . ."); Fink v. Ricoh Corp., 365 N.J. Super. 520, 574 (Law Div. 2003) (holding that the deceptive ad "must in fact have misled, deceived, induced or persuaded the plaintiff to purchase defendant's product or service.").

1(b)(3). 385 N.J. Super. at 180-84. Because damages were not sought on behalf of the class, the ascertainable loss element in Laufer was merely a standing requirement that only the named class representative needed to satisfy in order to obtain an injunction under the CFA from which the entire class would benefit. Id. at 185-87. As the Supreme Court's holding in International Union makes abundantly clear, however, the rule for class actions seeking damages under the CFA is that individualized proof of ascertainable loss and causation is required from class members. See 192 N.J. at 390-93.

The Law Division denied class certification because it correctly concluded that Plaintiff had not satisfied the predominance requirement. As she recently re-affirmed in her reply brief to this Court, "the gravamen of plaintiff's suit remains remarkably simple[:] Defendants' marketing claim that Relacore can shrink belly fat through control of the hormone cortisol is false, unproven and unsubstantiated." (Prb1.) But as Respondents note in their own submissions, the evidence at the class certification hearing established that Relacore was not marketed merely as a weight loss pill. (Db29-34.) Defendants also advertised and sold Relacore as a stress-reducing, mood improving dietary supplement. Indeed, an advertisement for Relacore that appeared during the class period did not even mention cortisol, the product's fat-shrinking properties or the findings of scientists. (Da179.) Instead, this advertisement promoted Relacore as a "Stress Mitigating Compound Formulated to help: Reduce Stress, Reduce Mild Anxiety, Improve Mood, Fight Mid-Day Fatigue [and] Increase Energy" (the "Stress Mitigating Compound Ad"). (Da179.)

Plaintiff does not allege that the claims in the stress-reducing advertisement are false. In fact, at the class certification hearing, her counsel complemented Respondents on this advertisement because they had removed the statements that Plaintiff believes are fraudulent -- namely, those relating to

Relacore'a ability to shrink belly fat by reducing cortisol. (Da156-57 (plaintiff's counsel arguing that, because it did not mention belly fat or cortisol, the Stress Mitigating Compound Ad "really proves our point. The defendants got caught with their hands in the cookie jar, and what they did was they changed their ads, and **I applaud them for having changed their ads**." (emphasis added).) Accordingly, Plaintiff has tacitly conceded that at least some of the advertising at issue here did not violate the CFA.

That concession is fatal to the certification of the proposed class because it confirms there is no way to establish the Defendants' liability under the CFA to all members of the class through class-wide proofs. Individualized inquiries -- and a great number of them -- are inevitably required. For example, Plaintiff cannot prove unlawful conduct on a class-wide basis because she has only challenged the truth of a subset of Respondents' advertisement claims, which are only relevant to a subset of Plaintiffs' proposed class. Even if Plaintiff were to establish at a class-wide trial that Respondents' claims about Relacore's ability to shrink belly fat were false, there would still be members of the class as defined who had not satisfied this element.

Moreover, Plaintiff cannot prove on a class-wide basis the requisite ascertainable loss and the causal nexus between

that loss and the alleged false advertising. Again, because the product was marketed as having multiple properties -- each of which was independently attractive to different consumers, but only one of which she claims was falsely advertised -- there is no set of uniform facts that Plaintiff can present to a fact-finder that would establish causation for all members of the class. There is no common nucleus of facts that unites purchasers who bought Relacore for its belly fat-shrinking properties after viewing Respondents' ads with those who bought the product for only its advertised stress-relieving benefits or with those who bought the product for reasons having nothing to do with the statements in any of the advertisements. In fact, on Plaintiff's own theory, class members who were induced to purchase Relacore by the Stress Mitigating Compound ad have no claim and cannot share in any class recovery because Plaintiff concedes the statements in that ad were true.

The only way the Law Division can determine if Respondents are liable to the members of Plaintiff's proposed class for damages under the CFA is to require the presentation of individualized proof by every class member for each element of the CFA claim. Each class member would have to "narrate his or her personal story." Gross, 303 N.J. Super. at 350. Given that the Law Division found that there are over 10,000 members of the putative class (Da169), requiring such proofs would

overwhelm the litigation and present a manageability nightmare for the trial court. Plaintiff's proposed class lacks even rudimentary cohesion. Consequently, it fails the predominance requirement of Rule 4:32-1(b)(3), and Plaintiff's motion for class certification was appropriately denied.[3]

B. The Court Cannot Presume That Each Class Member Suffered An Ascertainable Loss Caused By The Defendants' Alleged Unlawful Conduct

Relying heavily on Varacallo v. Massachusetts Mutual Life Insurance Company, 332 N.J. Super. 31 (App. Div. 2000), Public Citizen argues that the Court should excuse the fatal lack of cohesion in the class by "presum[ing] that the allegedly false and misleading claims made by defendants in advertising Relacore were a cause of the putative class members' loss of purchasing the dietary supplements." (PCb6-11.) In Varacallo, this Court presumed that class members who had all been shown the same misleading written sales literature bought their "vanishing premium" life insurance policies because of the defendant's omission of material facts from that literature.

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[3] For the reasons explained by Respondents, the use of questionnaires or a special master does not solve the problem of the trial court's having to make individualized inquiries as to each class member. (Db46-52.) Questionnaire responses must be subject to cross-examination by Respondents. Moreover, a special master's findings must still be reviewed and accepted by the trial court. See Rules 4:41-5(b)-(c) (governing review of special master's report). Because the buck ultimately stops with the trial judge, the need to conduct individualized inquiries as to the specific claims of potentially thousands of class members is inevitable.

Id. at 40-52. Accordingly, the Court saw no need to conduct individualized inquiries on the ascertainable loss and causal nexus elements of the class members' CFA claims and held that the proposed class satisfied the predominance requirement. Ibid. Public Citizen contends that Plaintiff's proposed class should receive the benefit of an identical presumption in this case. (PCb6-11.) The Court should reject this argument for three reasons.

First, Varacallo addressed a very narrow and extreme set of facts not present here. The dispositive point in Varacallo was that all class members were shown written sales literature that omitted the same key information about the carrier's anticipated future dividends. 332 N.J. Super. at 46-47. Had the carrier disclosed that information to the class, then each class member would have realized that he or she would be required to pay premiums out-of-pocket for a significantly longer period of time than advertised in the policy illustration and, accordingly, that Mass Mutual's vanishing premium policies were vastly inferior to those offered by other carriers. Id. at 48-49. Thus, virtually no rational consumer who knew the truth would have purchased a Mass Mutual policy. See id. at 48 ("It is inconceivable to us, considering the assumption that Mass Mutual's liability is premised on a knowing omission of material information, that discovery will reveal more than a very small

number of policyholders who would have purchased an N-Pay Policy, rather than a competitor's policy, if the Mass Mutual literature stated that the illustrated dividends 'probably will,' rather than 'may,' decrease and that the payout period 'probably will,' rather than 'may,' be longer than projected."). Under these circumstances, and given the absence in the record of any feasible explanation for the class members' behavior other than Mass Mutual's fraudulent omission of material information from its sales literature, this Court determined that a presumption of causation and ascertainable loss at the class certification stage was appropriate. Id. at 48-51.

Nothing even remotely resembling the facts of Varacallo exist on the record in the case at bar. To the contrary, as explained above, Plaintiff concedes that (i) Respondents advertised multiple properties for Relacore -- including the ability to shrink belly fat, reduce stress and increase energy -- that would benefit different consumers for different reasons, (ii) she only believes the advertised claims concerning Relacore's ability to shrink belly fat were false, and (iii) Respondents disseminated at least one advertisement that did not mention the product's fat-shrinking abilities at all. (See Part I.A., supra.) Many consumers undoubtedly purchased Relacore solely for its ability to reduce their stress levels or increase their feelings of energy without regard to

whether it also might shrink their belly fat. Thus, there is absolutely no basis in this record for Public Citizen's assertion that "it is inconceivable that discovery would reveal more than a very small number, if any, of Relacore purchasers" who would have purchased the product. (PCb7-8.) With that premise eliminated, Public Citizen's attempted analogy to Varacallo crumbles.

Instead, this case is just like International Union, in which our Supreme Court denied class certification on predominance grounds where the class members, despite having received uniform information that allegedly omitted material facts (something which Plaintiff cannot even establish here), did not react to that information "in a uniform or even similar manner." 192 N.J. at 391; see also Fink v. Ricoh Corp., 365 N.J. Super. 520, 545-49, 557-58, 574 (Law Div. 2003) (denying certification to putative class of purchasers of digital cameras because of individualized inquiries concerning whether each purchaser was misled by the allegedly deceptive advertising and whether the deceptive conduct caused the class members' losses); Gross, 303 N.J. Super. at 346-50 (denying certification to putative class of purchasers of Pepcid because individual inquiries predominated over common questions). The individual issues that would have to be resolved to adjudicate the claims

of Plaintiff's proposed class eclipse any common questions that may exist. See Carroll, 313 N.J. Super. at 500.

Second, the Supreme Court's decision in International Union casts substantial doubt on the validity of any evidentiary presumption of causation under the CFA. The plaintiffs in International Union also argued that, so long as they proved a common set of facts concerning defendants' omission of adverse safety and efficacy information regarding Vioxx from its marketing materials, they were all entitled to a presumption that each class member suffered an ascertainable loss by overpaying for the drug. See 192 N.J. at 381, 391-92. The Supreme Court correctly characterized that as an improper attempt to import the "fraud on the market" theory from federal securities law, which applies a presumption that securities investors rely on the market to set an accurate price for a stock and, therefore, there is no need for a securities-fraud plaintiff to present *prima facie* proof that he heard and relied upon any false statement. Id. at 392.

The Court held that resort to such a convenient shortcut could not adequately substitute for the requirement that each class member present proof that it suffered an ascertainable loss that was caused by the defendants' unlawful conduct. Ibid.

> [T]o the extent that plaintiff seeks to prove only that the price charged for Vioxx was higher than it should have been as a result of defendant's fraudulent marketing campaign, **and seeks thereby to be relieved of the usual requirements that plaintiff prove an ascertainable loss, the theory must fail**.
>
> [Ibid. (citing N.J. Citizen Action, 367 N.J. Super. at 15-16 ("[P]laintiffs must nonetheless plead and prove a causal nexus between the alleged act of consumer fraud and the damages sustained.")) (emphasis added).]

It is impossible to square International Union's rejection of an evidentiary presumption under the CFA with the holding of Varacallo. Liability for payment of damages under the CFA requires **proof** that each plaintiff suffered an ascertainable loss caused by the defendants' wrongful conduct. If a putative class representative can marshal class-wide proof of these elements, then he may satisfy the predominance requirement and obtain class certification.[4] But he cannot circumvent the predominance requirement altogether through the expedient of presuming that he will be able to satisfy the causation and ascertainable loss requirements at a later date.

Finally, even were the Court to adopt the presumption advocated by Plaintiff and Public Citizen, that would still not resolve the predominance issue with respect to this proposed

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[4] Indeed, given the unique factual circumstances in that case, it may be that the plaintiff in Varacallo would have been able to present such class-wide proofs. Plaintiff in the case at bar cannot.

class. That is because any such presumption is rebuttable, and on the facts of this case the Respondents are sure to litigate the validity of the presumption as to each putative class member. Given the multitude of possible purchaser profiles discussed above, there are potentially thousands of class members as to which the presumption of causation and ascertainable loss could be successfully rebutted. As a result, by adopting the requested presumption the trial court would not save itself from having to engage in thousands of individualized inquiries concerning these two elements of the class members' CFA claims. The fundamental lack of cohesion in Plaintiff's proposed class defeats any court's ability to certify it -- presumption or no presumption.

POINT II

EVEN IF A CLASS ACTION IS SUPERIOR TO OTHER METHODS OF ADJUDICATION, A CLASS CANNOT BE CERTIFIED IF IT FAILS THE PREDOMINANCE REQUIREMENT

Anticipating that it may not obtain the improper presumption it seeks, Public Citizen's fallback argument is that the Court should ignore the predominance requirement, certify the class anyway and leave it to the parties and trial court figure out how to manage it. (PCb11-13.) This "worry-about-it-later" result is called for, according to Public Citizen, because "the small amount of money at stake for each individual Relacore purchaser" means that "a denial of class certification

will effectively end litigation over Relacore's fraudulent advertising." (PCb13.) In other words, Public Citizen argues for a rule under which the superiority of the class action mechanism for adjudicating a particular set of claims trumps all other considerations relating to class certification. This is not the law, and never has been.[5]

As the plain language of Rule 4:32-1(b)(3) makes plain, to certify a class the trial court must find both that common questions "predominate over any questions affecting individual members" and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 4:32-1(b)(3). The reason for this dual requirement is that the predominance and superiority prongs of the Rule serve different purposes. As discussed above, the aim of the predominance inquiry is to ensure the existence of a cohesive class. See Iliadis, 191 N.J. at 108. By contrast, the superiority requirement assumes the existence of a cohesive class and seeks to evaluate both the "fairness and efficiency of the class action proceeding" by comparing it to alternative ways of litigating the case. See International Union, 192 N.J. at 383. Although the lack of financial incentive for individual class members to pursue their own claims through discrete

[5] We in no way concede that a class action is the superior method of adjudication on these facts.

lawsuits certainly supports a determination that a class action is a superior method of adjudicating the class members' claims, see id. at 383-84, it is not a substitute for the existence of a cohesive class. If it were, the predominance requirement would cease to have any independent significance, and the trial courts of our State would be compelled to certify class actions that are really nothing but extremely large consolidated groups of individual lawsuits.

Adopting the principle for which Public Citizen advocates would also dramatically increase the opportunities for plaintiffs and their lawyers to use the class action as a tool to extort settlements for marginal or meritless claims. As this Court noted when it reversed certification of the class in Carroll v. Cellco Partnership, the "courts are not in the business of providing a forum where the only practical result is the generation of huge attorneys' fees." 313 N.J. Super. 488, 596 n. 4 (App. Div. 1998). Part of the courts' defense against exploitative class litigation is maintaining teeth in the class certification standard. Once a class is certified, the costs to the defense of adjudicating it increase substantially and sometimes generate pre-trial settlements that bear no relation to the validity or strength of the plaintiffs' claims. If class certification in consumer fraud actions becomes pro forma merely because each class member has a small claim, then more and more

defendants who fail to obtain dismissal of the action at the pleadings stage will simply settle to avoid crippling litigation costs. Far from realizing the class action rules' ideal of equalizing adversaries' ability to conduct litigation against one another, Public Citizen's proposed rule of automatic certification enables class plaintiffs and their attorneys to wear down corporate defendants into paying claims that lack merit under the law. Moreover, such a role would attract out-of-state "litigation tourists" seeking to litigate class claims they cannot get certified in their home jurisdictions.

Moreover, Public Citizen's concern that affirmance of the Law Division's refusal to certify Plaintiff's proposed class will leave New Jersey's citizenry at the mercy of every snake oil salesman is overblown. (PCb13.) For starters, the CFA's provisions for treble damages and recovery of attorneys' fees already incentivize counsel to represent victims of consumer fraud who themselves have small claims. N.J.S.A. 56:8-19. In addition, this Court in Carroll rejected an argument similar to the one Public Citizen advances. In response to the trial court's determination that a class action was superior because individual consumers of cellular telephone service had small claims, this Court stated

> [t]his may be so insofar as the nominal damages for each customer might not warrant a separate suit. However, insofar as there may be ills to

> be corrected in defendant's practices, injunctive relief in the courts can be sought, or federal or state administrative agencies might provide regulatory solace for plaintiffs.
>
> [Carroll, 313 N.J. Super. at 506.]

Indeed, the Court went so far as to countenance the possibility that, because of the class representative's failure to satisfy the requirements for class certification, there may not be a judicial remedy available to the class as a whole. Id. at 510. Far from portending the end of protection for consumers as we know it, according to the Carroll Court, the denial of class certification is likely to merely result in shifting responsibility for fashioning an appropriate remedy to the other Branches of State Government.

> As noted earlier, an injunctive relief claim might serve the ends of the plaintiffs who wished to improve service. If no judicial remedy is available, it may be the responsibility of federal or state regulators or the Legislature to administer existing laws or to design laws to compensate consumers when they have been injured by deceptive billing practices of cellular telephone purveyors.
>
> [Id. at 510-11.]

The same is true here. The Attorney General has extensive powers to enforce the CFA against snake oil purveyors. N.J.S.A. 56:8-3 et seq. The Federal Trade Commission and other federal agencies may also have regulatory or enforcement jurisdiction. If existing laws are inadequate to protect consumers from certain kinds of deceptively marketed products,

the New Jersey Legislature and Congress are both in the business of passing new laws. Regardless of whether these alternative remedies are satisfactory to Public Citizen, Plaintiff or her counsel, their existence fatally undermines the case for distorting the class action rules to permit certification of a class that, under those rules as written, should not be certified. Only by following their rules and staying within their proper institutional boundaries can the Courts serve their function of dispensing equal justice under law.

CONCLUSION

For the foregoing reasons, this Court should affirm the Law Division's Order denying certification of the putative class.

Respectfully submitted,

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Dated: October 16, 2008

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-4598-07-T-1

MELISSA LEE, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

vs.

CARTER-REED COMPANY, L.L.C., a/k/a THE CARTER REED COMPANY, BASIC RESEARCH, L.L.C., DG ENTERPRISES, INC., ALPHAGENBO TECH, L.L.C., BODY INNOVENTIONS, L.L.C., COVARIX, L.L.C., COVAXIL LABORATORIES, L.L.C., BYDEX MANAGEMENT, L.L.C., WESTERN HOLDINGS, LLC, DENNIS W. GAY, and NATHALIE CHEVREAU,

Defendants-Respondents.

ON APPEAL, BY LEAVE GRANTED, FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION - UNION COUNTY DOCKET NO. UNN-L-3969-04

SAT BELOW:

HON. KATHERINE R. DUPUIS, J.S.C.

CIVIL ACTION

BRIEF OF *AMICI CURIAE* THE NEW JERSEY LAWSUIT REFORM ALLIANCE AND THE NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENTS

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